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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

I. Whether a federal court may grant habeas corpus relief to an individual free on personal recognizance prior to a trial *de novo*?

II. Whether a federal court may sit as a court of appellate review to determine the sufficiency of evidence adduced at a bench trial where the state provides for a trial *de novo* as the sole remedy for anyone dissatisfied with the result of a bench trial which a defendant has chosen voluntarily in the first instance?

III. Whether *Burks* v. *United States*, 437 U.S. 1 (1978), has application to the trial *de novo* system?

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OPINIONS BELOW.

The opinion of the Court of Appeals, Lydon v. Justices of The Boston Municipal Court, is reported at 698 F.2d 1 (1st Cir. 1982). The opinion of the District Court, Lydon v. Justices of the Boston Municipal Court, is reported at

536 F.Supp. 647 (D. Mass. 1982). The decision of the Supreme Judicial Court of the Commonwealth, Lydon v. Commonwealth, is reported at 381 Mass. 356, 409 N.E.2d 745 (1980).

JURISDICTION.

The judgment of the court below was issued on December 30, 1982. Issuance of the mandate was stayed, on motion, pending the filing of a petition for writ of certiorari. The petition for writ of certiorari was filed on March 4, 1983, and was granted on June 27, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

FIFTH AMENDMENT.

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...."

FOURTEENTH AMENDMENT.

"...[N]or shall any state deprive any person of life, liberty or property without due process of law...."

STATEMENT OF THE CASE.

Michael Lydon was complained of, in the Boston Municipal Court, for possession of burglarious implements and breaking and entering a motor vehicle with the intent to commit a misdemeanor (Joint Appendix, 1a).[1/] Although he had a right to a jury trial in the first instance, he elected a bench trial, preserving his right to a subsequent jury trial if dissatisfied with the results of the bench trial.[2/]

1/ Hereinafter "J.A.".

2/ Mass. Gen. Laws c. 218, §§26, 26A.

At the close of evidence at the bench trial, counsel for Lydon argued that the Commonwealth had failed to introduce sufficient evidence on an element of the crime. A guilty verdict was entered. Lydon then claimed his right to trial by a jury of six. Prior to the jury trial, he moved to dismiss the complaint, alleging that the evidence at the bench trial had been insufficient to support conviction. The motion was denied. (J.A. 1a).

Lydon then sought extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3. The jury trial was stayed and two questions were reported to the

Supreme Judicial Court of Massachusetts.[3/]

The majority of the Supreme Judicial Court found the double jeopardy claim to be without merit and further found that a jury trial judge would have no occasion to consider the sufficiency of

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3/1. "Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

2. "Assuming that a jury trial in such an instance would be a denial of defendant's right not be be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial had denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?" (J.A. 20a).

the evidence at the bench trial. Lydon v. Commonwealth, 381 Mass. 356, 367 (1980). (J.A. 47a).

Lydon filed a petition for writ of certiorari which was denied. 449 U.S. 1065 (1980).

A petition for writ of habeas corpus was then filed in the Federal District Court for the District of Massachusetts. (J.A. 21a). The respondents below moved to dismiss on the grounds that the court lacked jurisdiction, that the petition failed to state a claim upon which relief could be granted and that petitioner had failed to exhaust state remedies. (J.A. 32a). The court denied respondents' motion to dismiss and ordered that the petition be granted, that the petitioner be released on personal recognizance and that he not be retried. (J.A. 35a).

The order of the district court was stayed pending appeal.

The Court of Appeals affirmed the judgment and granted the following relief:

> "The appropriate relief is simply issuance of the writ providing Lydon his freedom from being required to answer any summons to a second trial. We have no reason to believe the Commonwealth will seek to retry him unless the decision is reversed. Lydon v. The Justices of the Boston Municipal Court, 698 F. 2d 1, 10 (1st Cir. 1982) (J.A. 81A).

SUMMARY OF THE ARGUMENT.

The Massachusetts trial de novo system, applicable to lesser offenses, permits a defendant to choose a bench trial in the first instance with a right to a de novo six-man jury trial if he is dissatisfied with the outcome, or, he may choose a first instance jury trial with full appellate rights following

conviction. In the instant case respondent opted for the former procedure and then obtained federal habeas relief from the de novo trial on the ground that his conviction at the bench trial was based on insufficient evidence and therefore the double jeopardy protections enunciated in Burks v. United States, 437 U.S. 1 (1978) would preclude a de novo trial.

The petitioners maintain that the Court below erred in granting pre-trial habeas corpus relief to respondent. The respondent, free on personal recognizance prior to a de novo trial he claimed, was not under sufficient restraint to be deemed to be "in custody" for the purpose of claiming jurisdiction under 28 U.S.C. §2241. Nor, having "wiped out" the judgment against him at a bench trial by his

claim of a de novo trial, was the respondent "in custody pursuant to a judgment of a state court," so as to satisfy the jurisdictional prerequisites of 28 U.S.C. §2254.

There is no authority for the proposition that a federal court has jurisdiction to exercise pre-trial habeas review of evidentiary sufficiency claims arising out of state criminal proceedings. Only by extrapolating constitutional principles from quite dissimilar contexts could the court below create a framework by which it could interject itself into the criminal procedures of Massachusetts. Moreover, even if a technical basis for exercising jurisdiction existed, the court below abused its discretion and principles of comity and federalism by granting the

relief in question, i.e. effectively enjoining a state prosecution.

The instant petition for writ of habeas corpus does not present a colorable claim of double jeopardy violation. It presents, in fact, only a claim that the bench trial conviction was based on evidence insufficient as a matter of law to support conviction. As such it is analogous to similar claims within the federal system wherein a jury has failed to reach a verdict in a case in which the defendants motion for judgment of acquittal has been denied. After a mistrial has been declared, the majority of the circuits will not permit interlocutory appeal of the sufficiency issue prior to a second trial. Yet, the court below, in misplaced reliance on Abney v. United States, 431 U.S. 651 (1977), and Jackson v. Virginia, 443

U.S. 307 (1979), has held that the federal court may review such a claim arising in a state trial. However, Abney presented a perfected and colorable claim of double jeopardy within the framework of federal appellate review. The case did not involve the issue of collateral habeas review. Jackson on the other hand, dealt solely with the standard to be applied when a federal court had jurisdiction under §2254 to review, postconviction, a sufficiency of the evidence claim.

Finally, it is submitted, Burks v. United States, supra has no application where the Commonwealth does not provide appellate review of bench trials for any type of claim of error, but does provide for a de novo trial if an individual is dissatisfied with the outcome of the

bench trial he has freely chosen in the first instance.

ARGUMENT

I. THE PETITION FOR WRIT OF HABEAS CORPUS DID NOT SATISFY THE JURISDICTIONAL REQUIREMENTS UNDER EITHER 28 U.S.C. §2241 OR §2254

INTRODUCTION

The Massachusetts Trial De Novo System

Under the Court Reorganization Act, St. 1978, c. 478, a defendant, charged with a crime over which the Boston Municipal Court and the district courts of the Commonwealth have original jurisdiction,[4/] has a right to be tried by a jury in the first instance

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4/ Those crimes include all misdemeanors, except libel, and all felonies punishable by imprisonment in the state prison for not more than five years. Mass. Gen. Laws c. 218, §26.

or he may elect an initial bench trial.[5] If the defendant elects a bench trial, he must file a written waiver of the jury trial.[6]

If a bench trial is chosen, and a defendant is dissatisfied with the outcome, his sole remedy is a trial de novo, before either a judge or jury at his election with appellate review after conviction based upon the record of the de novo trial.[7] With the claim of the de novo trial, the judgment at the bench trial is "wiped

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5/ Mass. Gen. Laws c. 218, §26A.

6/ Id. The waiver will be received only if a defendant is represented by counsel or has filed a written waiver of counsel.

7/ Mass. Gen. Laws c. 218, §§26 and 27A; Mass. Gen. Laws c. 278, §18.

out." Mann v. Commonwealth, 359 Mass. 661 (1971). If a jury trial is chosen in the first instance, appellate review is available following conviction.[8/]

In order to appreciate fully the issues presented, a rather detailed analysis of the posture of the case before the courts of the Commonwealth and of the claim as initially raised in the federal court is required.

Contrary to respondent's continued protestations, no ruling as to the sufficiency of the evidence as a matter of law has ever been rendered in the state court. Lydon v Commonwealth, 381 Mass. 356, n.6, 361. The Supreme Judicial Court in examining whether the

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8/ Mass. Gen. Laws c. 218, §27(g).

decision in Burks v. United States, 437 U.S. 1 (1978), had application to the trial de novo system, held that it did not. The court reasoned as follows:

Burks dealt with an appellate determination that the evidence at trial was insufficient as a matter of law to warrant conviction and further held that, under those circumstances, the double jeopardy clause barred retrial. Lydon v. Commonwealth, at 361. Unlike the judicial system in which Burks was tried, the two-tier system does not provide for appellate review of alleged errors committed at a bench trial. Therefore, no court would consider the issue of the sufficiency of the evidence and Burks is inapplicable. This court in Burks, as the Supreme Judicial Court declared, simply did not consider "whether under double jeopardy

principles a defendant convicted on inadequate evidence at a bench trial has a right to reconsideration of that ruling prior to trial de novo." Id., at 361. Yet, it was the proposition that Burks required the Commonwealth to provide such an appellate procedure which Lydon urged upon the Supreme Judicial Court, and the court quite properly concluded that no such right of appeal or other review from a bench trial was constitutionally required under Griffin v. Illinois, 351 U.S. 12, 18 (1956). Id., at 363.

In accordance with the judgment of the Supreme Judicial Court, the docket entries in the Boston Municipal Court reflect a direction to the Jury Session Judge to "proceed with Trial De Novo since the defendants' request for jury

trial vacated the judgment of the bench trial". (J.A. 2a).

Prior to commencement of the jury trial he had sought, Lydon filed a petition for writ of habeas corpus in the federal district court, couching his claims in terms of a double jeopardy violation.

Claiming jurisdiction under 28 U.S.C. §§ 2241 and 2254, he alleged that further prosecution of the complaint would place him twice in jeopardy in violation of his rights under the Fifth and Fourteenth Amendments and that he had moved to dismiss in the jury session on the ground that the double jeopardy clause barred further trial because the original conviction was based on insufficient evidence as a matter of law" (J.A. 24a-25a). At no point did the petition request that the federal

court review the sufficiency of the evidence adduced at the bench trial under the due process clause. Rather, Lydon sought the writ to prevent the de novo trial, solely on the grounds of an alleged double jeopardy violation.

A. The Respondent Did Not Satisfy the Jurisdictional Requirements of 28 U.S.C. §2241.

It is not disputed that §2241 provides for the application for habeas corpus relief in a pretrial setting. However, it is equally clear that the writ "shall not extend to a prisoner unless...he is in custody..." 28 U.S.C. §2241 (c)(3).

Michael Lydon is neither a "prisoner" nor in "custody". Lydon was and is free upon personal recognizance pending a de novo trial he claimed. It is submitted that it would be difficult

to extend the normal meaning of 'prisoner' to one neither imprisoned, nor in imminent danger of imprisonment.

The court below in reliance on Hensley v. Municipal Court, 411 U.S. 345 (1973) held that Lydon was "in custody" under 28 U.S.C. §2241 and proceeded to review the sufficiency of the evidence adduced at his bench trial. It is submitted that Hensley does not support the court's finding of "custody".

First, Hensley did not hold that a person free on personal recognizance prior to trial is in "custody" for federal habeas purposes. This court held only that an individual who had been convicted and sentenced but who had been enlarged on his own recognizance under an order staying execution of sentence pending appeal was in custody for habeas purposes. The Court put

forth three basic rationales for its decision.

The Court reasoned that petitioner was subject to restraints "not shared by the public generally.... He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobediance itself is a criminal offense." 411 U.S. at 351.

The Court further noted that petitioner remained at large only by the grace of the stay and its numerous extensions. "The State has emphatically indicated its determination to put him behind bars and the State has taken every possible step to secure that result. His incarceration is not a speculative possibility that depends on a number of contingencies over which he

has no control. This is not a case where the unfolding of events may render the entire controversy academic." Id., at 351-52. (emphasis added).

Finally, the Court concluded, "[Our] conclusion that petitioner is presently in custody does not interfere with any significant interest of the State. Even if we were [to hold] that petitioner was not in custody that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. Id., at 352.

Hensley is readily distinguishable. The holding applies specifically to persons released on personal recognizance following conviction, not pre-trial de novo. Moreover, Hensley involves a further stay of execution of sentence, not a stay of a trial de novo.

Personal recognizance does not constitute a 'severe' restraint on an individuals liberty, rather, it is a restraint no greater than that imposed on a witness under subpeona. Personal recognizance requires only that an individual appear at a certain time for trial.[9/] It places no limitations on his movements, nor does it subject him to demand without notice.

Moreover, while it is clear under the case law that one need not be in "physical" custody, the requisite "legal" custody must involve "significant restraint". In Jones v. Cunningham, 371 U.S. 236 (1963), holding that a prisoner released on parole was

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9/ Mass. Gen. Laws, c. 276 §65.

in custody for federal habeas purposes, the court stated:

> "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in... 'custody'...within the meaning of the habeas corpus statute...." Id., at 243.

Unlike the petitioner in Hensley, the respondent in the instant case does not face certain incarceration; indeed, this is a case "where the unfolding of events may render the entire controversy academic." Hensley, 411 U.S. at 352. In the instant case, unlike Hensley, any future incarceration is a "speculative possibility that depends on a number of contingencies..." (Hensley, at 352.), the first of which is that he be convicted. Moreover, in considering the application of the third Hensley

criterion, the federal court's conclusion that petitioner herein is "in custody" does interfere with the Commonwealth's significant interest in maintaining its two-tier system.

It is therefore submitted that the restrictions imposed by a pretrial personal recognizance are not sufficient to constitute custody for federal habeas purposes. Nor, as will be discussed infra, does this case present any extraordinary circumstances which would justify a relaxation of the "custody" requirement. It is submitted that the court below has improperly extended Hensley from a post trial setting to a pre-trial situation and has opened the door to the federal court to all persons prior to trial.

B. The Jurisdictional Prerequisites of 28 U.S.C. §2254 Have Not Been Satisfied.

The court had no jurisdiction to grant relief under 28 U.S.C. §2254 for Lydon was not "in custody pursuant to a judgment of a state court." The claim of a trial de novo "wipes out" the proceedings at the bench trial. Mann v. Commonwealth, 359 Mass. 661, 666 (1971).

Most recently the Supreme Judicial Court in a discussion of Massachusetts trial de novo procedure has re-affirmed this principle:

> "The important point is that the defendant can still appeal to the jury of six session and obtain a trial de novo. It has long been the rule that 'the appeal from the judgment of the district court vacates that judgment and renders immaterial...all...errors or irregularities in the proceeding there.' Enbinder v. Commonwealth, 368 Mass. 214, 217, cert. denied 423 S.Ct. 1024 (1975)...(citations ormitted)." Commonwealth v. Duquette, 386 Mass 834, 846-847 (1982), 438 N.E. 2d 334, 342. See

also, Commonwealth v. Curtin, 386 Mass. 587, 591 (1982), 432 N.E.2d 510.

Or, as this Court has described the de novo system:

> At the de novo trial, all issues of law and fact must be determined anew and are not affected by the initial disposition. In effect, the taking of the appeal vacates the district court or Municipal Court judgment, leaving the defendant in the position of defendants in other States which require the prosecution to present its proof before a jury." (Footnote omitted). Costarelli v. Massachusetts, 421 U.S. 193, 194 (1975).

It is important to note that Lydon voluntarily elected to seek a bench trial and to wipe out the judgment of his bench trial by claiming a de novo trial. He was under no compulsion to do so.

The principle that the claim of a trial de novo "wipes out" the judgment at the bench trial is not diminished by

the fact that if a defendant fails to appear he shall be defaulted and sentence may be imposed upon him by the court in the six-man session.[10/]

While this court has held that habeas corpus jurisdiction is not defeated by release of a prisoner prior to termination of the habeas proceeding, it has never held that the petitioner need not be 'in custody' when the application for habeas corpus is filed. Carafas v. La Vallee, 391 U.S. 234, 238 (1968). Moreover, imposition of sentence upon a default involves a totally speculative and collateral act by a defendant and, in any event, until

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10/ Mass. Gen. Laws, c. 278 §24.

that contingent future possibility occurs, Lydon is not under a "judgment".

The federal district court below assumed jurisdiction to rule on the sufficiency of the evidence adduced at Lydon's bench trial. Only section 2254(e) specifically provides for such review, subject to the jurisdictional prerequisite of "custody pursuant to the judgment of a State court". If the court had no jurisdiction under §2254 it follows logically that it had no authority to review the sufficiency of the evidence.

Therefore, it is submitted that neither of the "custody" requirements of §§2241 and 2254 have been met and the court below had no jurisdiction to grant relief.

C. The Court Below Should Not Have Exercised Jurisdiction.

Assuming, arguendo, that the jurisdictional requirement has been met, it is submitted that the court below has violated principles of comity and federalism in granting pre-trial relief.

First, the threshold issue decided by the federal court was whether sufficient evidence was introduced at the bench trial to support conviction. No state court has ever ruled on this claim. Relief from a conviction in which such an error or any other error of law has allegedly occurred is had in Massachusetts by a de novo trial. Therefore, Lydon has not sufficiently exhausted his state court remedies.

Second, the pre-trial relief afforded, effectively aborting the de novo trial, runs contrary to decisions

of this and lower federal courts. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), is the leading case on the propriety of a pre-trial grant of relief. In Braden,[11/] this Court granted relief to a petitioner seeking to require the state to grant him a prompt trial. The Court emphasized that the relief requested would not "abort a state proceeding or ...disrupt the orderly functioning of the state judicial processes." Id., at 491. This Court emphasized

> "...that nothing we have said would permit the derailment of a pending state proceeding by an

11/ The petitioner was incarcerated under convictions in Alabama and under a detainer lodged by Kentucky officials following indictment in that state.

attempt to litigate constitutional defenses prematurely in federal court." Id., at 493.

The First Circuit, however, has effected precisely such a result. The double jeopardy defense is indeed premature because prior to a ruling by the federal district court on the sufficiency of evidence there exists no colorable double jeopardy claim. If the defendant challenges the evidentiary sufficiency of the prosecution's case he need but go forward with the de novo trial and put the prosecution to the test. The federal court should abstain where the issue may be resolved by trial on the merits. See Atkins v. People of State Michigan, 644 F.2d 543 (6th Cir. 1981); Neville v. Cavanaugh, 611 F.2d 673 (7th Cir. 1981). Moreover, no extraordinary circumstances justifying pre-trial relief have been presented.

See Braden at 507, (Rehnquist, J., dissenting); Moore v. DeYoung, 515 F.2d 437 (3rd Cir. 1975).

Therefore, it is submitted that even if the court had jurisdiction, the grant of relief was premature and violated principles of comity and federalism.

II. THE COURT BELOW IMPROPERLY ASSUMED JURISDICTION TO REVIEW A SUFFICIENCY OF THE EVIDENCE CLAIM PRIOR TO A DE NOVO TRIAL.

A. Sufficiency of the Evidence Claims Are Not Reviewable Prior To Trial.

Although petitioner characterizes his claim as one of double jeopardy, in reality his only perfected claim is one of a denial of a motion for directed verdict or motion for acquittal. Such a claim is neither appealable under Abney v. United States, 431 U.S. 651 (1977), nor does it raise a claim at this stage cognizable in a habeas proceeding.

There has been no ruling in the state court on the sufficiency of the evidence presented at petitioner's bench trial.

> "The Single Justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the Single Justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case." Lydon v. Commonwealth, 381 Mass. at 356, n.6.

> "No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue." Id., at 361.

Therefore, the only claim actually before the federal court is that it was error for the bench trial judge to deny the motion for directed verdict or for acquittal.

An attempt to frame such a claim in terms of double jeopardy must fail.

Several circuit courts of appeal have rejected such an attempt to bring the claim prior to trial under the Abney rationale. United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983); United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Carnes, 618 F.2d 68 (9th Cir. 1980); United States v. Rey, 641 F.2d 222 (5th Cir. 1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980).

For example, in Ellis the defendant and co-defendant were tried together, and a mistrial was declared after the jury was deadlocked. Ellis was granted severance and the jury deadlocked at the second trial. While his appeal based upon a claim of double jeopardy was pending, Ellis then moved to dismiss on the ground that the evidence presented at the second trial was insufficient to

sustain a conviction and therefore, a retrial would place him in double jeopardy. The motion was denied in the trial court. Ellis then attempted to appeal under the Abney rule. In dismissing the appeal, the Fourth Circuit stated:

> In an effort to bring his case within the scope of Abney, Ellis has attempted to frame a completely non-collateral issue-the sufficiency of the evidence to convict him (as he has yet to be convicted, this goes directly to the merits of his case)-in terms of double jeopardy. He argues that retrial after mistrials would violate the double jeopardy prohibition if insufficient evidence for conviction had been introduced at the prior trial. In essence, he seeks to have an appellate court decide his guilt or innocence and to perform a function properly left to the trial judge, that is, determining the sufficiency of the evidence to send the case to the jury. Merely because he has chosen to characterize the issue as one of double jeopardy, however, does not require this court to review it, for Abney limited review to colorable double

> jeopardy claims. Defendants cannot be allowed to delay trials and to dislocate the orderly procedure of the courts simply by raising frivolous claims of double jeopardy. Ellis, at 134.

United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), is also instructive. In Becton, the trial resulted in a deadlocked jury and a declaration of mistrial. Motions for judgment of acquittal which were made at the close of the prosecution's case and renewed after discharge of the jury were allowed in part, but denied in the main. On retrial of the remaining counts, Becton renewed the motion for acquittal and moved to dismiss on the ground of double jeopardy, alledging that the evidence submitted at the first trial had been insufficient to warrant submission of the case to the jury. The defendants attempted to appeal the

denial of the motions, arguing that Burks v. United States, 437 U.S. 1 (1978), should prevent retrial. The defendants' theory was that a hung jury should have the same legal effect as a reversal for insufficient evidence on appeal. The Fifth Circuit, however, rejected the use of the Burks rationale to provide jurisdiction under these circumstances. Noting that while under Burks a retrial would be forbidden after "a determination by the appellate judges" that evidence was insufficient,

> "[h]ere there has been no such determination of insufficiency by any court, trial or appellate. Instead we contemplate a contrary determination by the first trial court-that the evidence was sufficient to warrant submission to the jury-and a mere refusal by the jury to convict. Such a refusal is an action in no wise the necessary equivalent of a decision, even by the jury, that the evidence is insufficient to warrant submission. In the first place, of course, the jury is

neither equipped nor asked to make such a determination. In the second place, it is a commonplace that juries can refuse to convict even on substantial evidence of guilt, while, to the contrary, judges are not to acquit unless the government has clearly failed to produce evidence supporting a conviction when viewed most favorably to the prosecution. Burks, 437 U.S. at 16-17, 98 S.Ct. at 2149-2150. What the appellants seek instead, is a determination by us now on this interlocutory appeal before their retrial-that the evidence at the first trial was insufficient to warrant submission and that the trial judge erred in denying their motions for acquittal. This is new ground.

. . . . . .

Although in form the question presented here is that of denial of a motion asserting former jeopardy, in reality and in substance the appellants seek review of their motions to acquit made at the first trial. They argue that these should have been granted, since the evidence there was insufficient to support a jury submission, and that had they not been erroneously denied, no succeeding trial would have been permissible. Thus, we contemplate just such a "thinly disguised attempt to turn this [Abney]

appeal into a plenary review of his first trial" as the Second Circuit rebuffed in United States v. Klein, 582 F.2d 186, 196 (2d Cir. 1978), cert. denied, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 342 (1979). We conclude we must do likewise." United States v. Becton at 1295-1296.

The majority opinion in United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983), follows the Fourth, Fifth, and Ninth Circuits in holding that a denial of a motion for judgment of acquittal is not reviewable under the Abney rationale. The analysis applied by the District of Columbia Circuit is the same as advanced by petitioners in the instant case.

"....Richardsons' double jeopardy claim is premised entirely on the assumption that the trial court's ruling on the sufficiency issue was erroneous...the propriety of the trial court's ruling on that issue cannot be reviewed by an appellate court at this time. Therefore, since Richardson's double jeopardy claim exists at the appellate level only if the district court's

> sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time. In other words, because this court is unable to address the sufficiency issue at this time and because that issue is the only basis for Richardson' double jeopardy claim, Richardson has failed to make at this time any double jeopardy claim which can be reviewed by an appellate court." (footnotes omitted) Id., at 1083.

In the instant case Lydon presented no "colorable" double jeopardy claim to the federal court. At the time he sought federal relief his only claim was the allegedly erroneous ruling on the sufficiency issue. Thus, the federal court assumed jurisdiction solely to consider a question of the sufficiency of evidence.

As the above circuit courts have recognized, a claim disputing the sufficiency of evidence at a trial is simply not "collateral" under the rule

of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), rather it is essential to a determination of guilt or innocence, and therefore Abney does not require a different result.

Moreover, Abney concerned the construction of the term "final decision" under 28 U.S.C. §1291 and held that an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was permitted. The decision was concerned solely with federal appellate jurisdiction. It did not involve a jurisdictional issue in which the "potential conflict between courts of two different governments," (Radio Station WOW v. Johnson, 326 U.S. 120, 124 [1945]), necessarily implicates those principles of comity and federalism which dictate restraint from

precipitous federal involvement in state criminal proceedings. It is submitted that Abney, addressing the final judgment rule within a unitary system, has no effect on the jurisdictional requirements of §2254 or §2241(c)(3) concerning state prisoners.

While Abney does have significant constitutional overtones where a colorable claim of double jeopardy is presented prior to trial, it does not, it is submitted, lend support to the view of the First Circuit that the federal court will sit as a court of appellate review over bench trials in Massachusetts, nor does the decision in any sense require that the states provide interlocutory appellate review of evidence sufficiency questions. This is not a situation in which the Commonwealth provides for appeals to

protect some rights but not others.[12/] It is acknowledged that the Third Circuit in United States v. McQuilkin, 673 F.2d 681 (3rd Cir. 1982), (permitting interlocutory appeal of evidence insufficiency issue in federal court) and the Sixth Circuit in Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981), (permitting habeas review prior to state retrial), reached the opposite result. However, it is submitted that these cases were wrongly decided and Delk in particular is distinguishable on both practical and conceptual grounds. Delk had been convicted of murder. On direct appeal he raised the issue of the

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12/ See Spradling v. Texas, 455 U.S. 971 (1982), (Brennan, J., dissenting from denial of certiorari, at 973).

sufficiency of evidence to support his conviction. The Tennessee Supreme Court reversed for trial errors but specifically found the evidence to be sufficient. Thus, Delk had exhausted the appropriate state remedy for his claim. In the instant case, Lydon has not exhausted the provided remedy for his claim - a de novo trial; there has been no state determination of the sufficiency of evidence claim and, as a practical matter, Lydon is not faced with a protracted trial nor with the spector of a substantial term of imprisonment.[13/]

13/ Although the Boston Municipal Court has jurisdiction only over misdemeanors and lesser felonies punishable in the State prison for up to five years, the court may sentence only to the local jail or House of Correction in which the maximum term of imprisonment is two and a half years. Mass. Gen. Laws, c. 218, §27; c. 279, §3.

The Third Circuit in McQuilkan erred, it is suggested, by focusing on the nature of the right ultimately asserted, rather than the actual claim presented. As the District of Columbia Circuit points out:

> "The argument that the nature of the right involved in a double jeopardy claim requires an appellate court to immediately review all denials of double jeopardy is in reality an argument that the double jeopardy clause requires immediate appellate consideration of such claims". United States v. Richardson, at 1082, n.21.

The Third Circuit's approach therefore flies in the face of the traditional rule that there is no right to an appeal.

The First Circuit did acknowledge some anomaly in the fact that a majority of the circuits would not permit interlocutory review of a sufficiency of the evidence claim within the federal system, yet the federal court would

inject itself into a state's criminal proceeding in order to review such a claim.[14/] The petitioners submit that the First Circuit's position in this regard is not merely anomalous, but a violation of fundamental principles of comity and federalism and a failure to recognize that the Commonwealth is a coequal sovereign.

In summary, it is submitted, respondent brought no double jeopardy

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14/ The decision of the First Circuit has another curious effect on the exercise of the right to jury trial. For example, if an individual elects a first instance jury trial and questions the sufficiency of the evidence, he must pursue the normal process of review through the appellate courts of Massachusetts in order to exhaust state remedies before seeking federal relief. However, if a bench trial is chosen, under the instant decision one can go directly to the federal court for review of the sufficiency claim.

claim before the federal court; at best, he requested collateral review of a denial of a motion for directed verdict or for acquittal.[15/] There can be no dispute that the federal court on a habeas corpus action does not sit as a court of review over such matters; especially where the petitioner does not allege in his petition that he has been

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15/ It is arguable that a claim of insufficient evidence raised prior to trial does not present a federal question cognizable in a habeas petition. In Reed v. Texas, No. 80-6948, the question, "[w]hen state trial court grants new trial to the criminal defendant under sentence of death, is defendant entitled to appellate review, prior to subsequent trial, on his claims that evidence adduced at first trial was insufficient to support convicted?", was presented. This Court ordered summary dismissal "for want of a substantial federal question." 454 U.S. 805, (1981). Under Hicks v. Miranda, 422 U.S. 332, 343-354 (1975), a summary dismissal for want of a substantial federal question is a decision on the merits.

denied due process under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). Nor was it proper for the federal court to interject such a theory of the case into the habeas proceeding. See Picard v. Connor, 404 U.S. 270 (1971); Turner v. Fair, 617 F.2d 7 (1st Cir. 1980).

Therefore, respondent was not in custody pursuant to a judgment of the state court, nor did his claim constitute a claim of constitutional dimension cognizable in a habeas corpus petition.

B. The Relief Granted Violates The Proper Scope of Habeas Corpus Relief.

The relief granted, ordering release from personal recognizance accompanied by an express expectation that the Commonwealth would not attempt to provide the trial de novo respondent had

requested had the practical effect of enjoining the Commonwealth from trying the respondent and exceeded the proper scope of relief to be accorded a habeas applicant. Kolski v. Walton, 544 F.2d 762 (5th Cir. 1977); United States ex rel Stevens v. Circuit Court of Milwaukee County, 675 F.2d 946 (7th Cir. 1982).

Principles of judicial restraint premised upon the doctrines of comity and federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971), require, it is submitted, that a federal court not interfere in a pending state criminal proceeding whether relief is sought by way of habeas corpus, declaratory judgment or injunction in the absence of extraordinary circumstances. In Younger v. Harris, the court held that under basic

principles of equitable restraint and the more "vital considerations of comity and federalism", federal injunctive relief was precluded in the absence of extraordinary circumstances showing a threat of irreparable injury which is both great and immediate. This policy, the court found to be grounded in basic doctrines of equity jurisprudence and

> "is reinforced by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their seperate ways" Younger, 401 U.S. at 44.

That notions of comity and federalism have a substantial role in determining the availability of federal

habeas relief is not subject to real dispute. See Stone v. Powell, 428 U.S. 465 (1976). Since there is no practical difference in granting habeas relief from a pending state trial and enjoining that trial, the abstention hurdles should have been met in this case. However, in the instant case neither bad faith nor harrasment has been alleged. Irreparable injury is not established merely by "...the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution. Id., at 46.

A number of lower federal courts recognizing the applicability of Younger principles where habeas relief is sought prior to trial, Robinson v. Wade, 686 F.2d 298 (5th Cir. 1982), have held that a "colorable" double jeopardy claim constitutes the threat of irreparable

injury necessary to fall within the exception to Younger principles. See Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215, 219 (1st Cir. 1977); Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979).

Given that the double jeopardy clause protects against multiple prosecutions as well as multiple convictions, (see Abney v. United States 431 U.S. 651, 661 (1977)), the position espoused in these cases has merit. The instant case, however, did not present a colorable double jeopardy claim but merely a claim that Lydon was convicted on insufficient evidence. Moreover, as the Seventh Circuit has recognized, merely because a defendant complains about a right not to be subjected to double jeopardy that does not necessarily require that he should be

granted the extraordinary remedy of pre-trial federal habeas corpus. Stevens v. Circuit Court, supra at 948.

While the situation in Stevens differs from the instant case in that Stevens originally chose to plead guilty and hence had not undergone a first trial, it is analogous in that Lydon chose to undergo the bench trial. It was not the state, but he, who requested the second trial. Moreover, the initial proceeding in this case, as in Stevens, involved no great expenditure of time.[16/] The foregoing circumstances

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16/ The transcript of the bench trial proceeding, including the taking of evidence and argument for a required finding of not guilty, consumed only eleven pages. Transcript of the Evidence, Commonwealth v. Michael Lydon, Robert McDonald, B.M.C. Nos. 9569, 9570, 9571, 9572.

should have weighed heavily against the exercise of jurisdiction in this case.

> "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." Francis v. Henderson, 425 U.S. 536, 539 (1976).

On balance, it is submitted, interruption of a state criminal proceeding places a far greater burden on the orderly administration of justice than the burden placed upon the defendant in going forward with a trial he has requested.

III. THERE IS NO CONSTITUTIONAL BASIS FOR EXTENDING BURKS V. UNITED STATES, 437 U.S. 1 (1978), TO THE TRIAL DE NOVO SYSTEM.

A. Burks Is Limited In Its Application.

The precise holding in Burks v. United States, 437 U.S. 1 (1978), is

that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient", Burks at 18.[17/] Although the federal court here dismissed petitioners' "preoccupation" with the Supreme Court's articulated requirement that a reviewing or appellate court must determine insufficiency before Burks comes into play, "as a formal nicety" Lydon v. Justices of the Boston Municipal Court, 536 F.Supp at 651 (1982), every decision on the subject which petitioners have discovered acknowledges such a requirement. Clearly, the requirement was critical to the decisions of the Fourth, Fifth, Sixth, Ninth and District

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17/ The rule is applicable to the states. Greene v. Massey, 437 U.S. 19 (1978).

of Columbia Circuits discussed above. Most recently, this Court in Tibbs v. Florida, 457 U.S. 31 (1982), holding that an appellate ruling, based upon the weight of the evidence failed to implicate the Burks decision, emphasized throughout the opinion that the Burks exception to permitting retrial after reversal is triggered "once the reviewing court has found the evidence legally insufficient" to support the conviction. Tibbs at 41. See also Bullington v. Missouri, 451 U.S. 430, 442-443 (1981).

This Court's discussion of the issue in the above cases makes quite clear that Burks has application only where a court which has jurisdiction to review the sufficiency of evidence finds that as a matter of law the evidence was insufficient to support a conviction.

Under those circumstances, retrial is forbidden,. Hudson v. Louisiana, 450 U.S. 40, 45, n.5 (1981).

Hudson v. Louisana, supra, does not render Burks applicable to the trial de novo system. In Hudson, the Louisiana Supreme Court appeared to have held that under Burks double jeopardy protections are violated only where the reviewing court has determined that the prosecution has adduced no evidence rather than found solely a lack of sufficient evidence. Id., at 43. This court reversed, holding that Burks precluded retrial after a finding by a reviewing court, be it strictly appellate or by way of a motion for new trial, that the evidence at the first trial was insufficient as a matter of law. Id., at 42-43.

Both Burks and Hudson involve a

post-conviction framework in which a procedure for "review" is established. Massachusetts does not provide for "review" of bench trials. Rather, it permits a defendant to "wipe out" or nullify the conviction by moving for a wholly new determination of guilt or innocence without the necessity of alleging any error in the bench trial proceeding. Neither Burks nor Hudson require that a state provide for a "reviewing" court. Cf. Griffin v. Illinois, 351 U.S. 12, 18 (1955).[18/]

18/ Even were this court to re-examine the constitutional right to an appeal in a proper case, it is suggested that the Massachusetts procedure which grants a de novo trial for relatively insubstantial offenses is a sufficient safegard to insulate an individual from being deprived of liberty by the "unfettered discretion of a single judge." See Jones v. Barnes, ___U.S. ___, 103 S.Ct. 3308, 3315, n.1 (1983), (Brennan, J. dissenting).

In the instant case, not only has a reviewing court not determined that the evidence introduced at petitioner's bench trial was insufficient, there is no reviewing or appellate court within the Massachusetts system to make such a determination.[19]

As previously stated, under Massachusetts trial procedure, there is no appellate review of a bench trial which is voluntarily chosen by a defendant. Relief from an adverse decision at the bench trial is by a de novo trial before a jury or another judge, if the defendant waives the

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19/ Respondents' contention that a finding of insufficiency as a matter of law was made by the Single Justice must fail in the face of the specific refutation of such a contention in the majority opinion in Lydon v. Commonwealth, 381 Mass. 356, 359, n.6, 361.

jury. The claim of the de novo trial wipes out all that has gone before. Mann v. Commonwealth, 359 Mass. 661 (1971). In order for the petitioner to raise a claim under Burks, it is necessary that an appellate court has ruled in his favor on the sufficiency of the evidence claim. However, there is simply no constitutional requirement that Massachusetts provide such review from a bench trial. Griffin v. Illinois, 351 U.S. 12, 18 (1956). Therefore, Burks, simply, is not applicable.

It is further submitted that the First Circuit's opinion that review of the sufficiency of the evidence claim in the first instance by a federal district court by way of a habeas corpus petition, satisfies the Burks requirement is unsupported and violates

the long-standing rule that the writ "will not be allowed to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178 (1947).

The First Circuit's reliance on Jackson v. Virginia, 443 U.S. 307 (1979) is misplaced. Jackson sought habeas corpus relief pursuant to 28 U.S.C. §2254, after a state Supreme Court had denied on the merits a petition for writ of error which alleged that the evidence was insufficient to support conviction. This Court found that Congress had specifically provided for review of the issue in the federal court under §§2254[20/] This Court held only that,

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20/ Jackson did not involve pre-trial review of the issue under §2241.

> ...in a challenge to a state criminal conviction brought under 28 U.S.C. §2254-if the settled procedural prerequisites for such a claim have otherwise been satisfied-the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found guilt beyond a reasonable doubt". Id., at 324.

The court announced a new constitutional standard of review applicable once jurisdictional prerequisites under §2254 have been met; it did not extend habeas corpus jurisdiction. Nor, does Jackson provide a basis for extending Burks to the trial de novo system.

The rationale put forth by this Court for providing such review also indicates it's inapplicability to the instant situation.

> "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur-reflecting as it does the

> belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right-is not one that can be so lightly abjured" Id., at 323.

There is no finality, in general, attendant to a determination of guilt at a bench trial and in this specific case the judgment was "wiped out" when Lydon voluntarily chose a de novo trial. Thus, it is clear that Lydon has not satisfied the settled procedural prerequisite for bringing his claim under §2254.

Therefore, it is submitted that the court below, sitting as a habeas court, has improperly assumed for itself the role of a first instance reviewing court over a state criminal proceeding.

> "It hardly bears repeating that habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of

guilt determination at criminal trials. See generally Stone v. Powell, 428 U.S. 465. Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems. Jackson v. Virginia at 332, n. 5 (Stevens J. concurring).

B. The Double Jeopardy Clause Is Not Offended By Operation Of The Trial De Novo System.

This is not a situation which the double jeopardy clause is designed to protect against. Double jeopardy protections are directed against

> "...permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

The government is not pressing a second trial, the petitioner has chosen it, just as he voluntarily opted for a bench trial in the first instance. See, United States v. Scott, 437 U.S. 82, 99 (1978). This procedure was upheld in

face of a double jeopardy claim in Ludwig v. Massachusetts, 427 U.S. 618 (1976) wherein the Court stated:

> "Nothing in the Double Jeopardy Clause prohibits a state from affording a defendant two opportunities to avoid conviction and secure an acquittal.' Id. at 632.

See also Colton v. Kentucky, 407 U.S. 104 (1971).

As the dissenting opinion below so aptly points out, if the de novo system is viewed as a whole there is "little ground for serious concern that the policy underlying the double jeopardy clause is being offended". Lydon at 11. (J.A. 83a).

First, the system is not forced upon the defendant, he may choose an initial jury trial with conventional appeal. The basic double jeopardy protections are afforded a defendant in the de novo

system, if a judgment of acquittal is entered at the first tier further prosecution is precluded. As a practical matter the system provides a defendant with two opportunities for acquittal on the facts. As the dissenting opinion recognizes, in foregoing a right to appeal at the first tier, "convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable doubt". Lydon at 12. (J.A. 84a).

Moreover, even though at a de novo trial the prosecution could put in a stronger case (if additional evidence existed), the defendant has gained a tactical advantage of having discovered the prosecution's case and, it is unlikely that the prosecution would present less than its best case in the

first instance for an acquittal would bar further proceedings. Finally, if by chance a defendant is convicted at the de novo jury trial, he has an appellate remedy to vindicate his claim.

The decision below needlessly affects the ability of the state to experiment in the area of criminal trial procedure and to provide practical advantages to defendants, without any indication that the trial de novo system operates in a manner which is arbitrary, capricious or unreasonable. See New York State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1972) (Brandeis, J.).

The decision not only constitutes an injustice to the Commonwealth,[21] but

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21/ Subsequent to the First Circuit decision in Lydon, the Supreme Judicial Court in dicta declared 'in aid of sound

(footnote continued)

coupled with its total relaxation of "custody" requirements places an unnecessary burden upon the federal district courts by requiring them to sit as a court of appellate review in the first instance in every case in which

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(footnote continued)

judicial administration, that from the issuance of a rescript upon this opinion, twenty-eight days hence'...a waiver of a claim of double jeopardy shall be obtained at the same time as the written waiver and consent to be held by the court without a jury is obtained." Commonwealth v. Montanez, 388 Mass. 603, 605, 447 N.E.2d. 660 (1983).

The court adopted this course in response to the decision of the First Circuit and in recognition of the federal court's assumption of power to review all bench trials. Id. The court's directive however, does not affect cases tried in the district courts from the time of the Lydon decision on August 22, 1980 and the effective date of the waiver requirement - April 29, 1983.

insufficiency of evidence is alleged by a defendant convicted at a bench trial in the Commonwealth of Massachusetts. Such a result disrupts the orderly administration of justice in the already overburdened federal system and causes significant delay in the two-tier system where those convicted in the bench trial may now avail themselves of yet a third federally created tier. Such a procedure offends all notions of comity and federalism and creates an entirely new class of cases susceptible to habeas review.[22/] Moreover, the federal

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22/ For example, the following habeas petitions are pending in the District Court and Court of Appeals: Tinder v. Sister Rose Paula, C.A. No. 83-1507; Hutson v. Justices of the District Court of Wareham, C.A.No. 83-1088 (denial of counsel at bench trial); Montanez v. Justices of the Boston Municipal Court, No. 82-1965-N; Murchinson v. Justices of the Boston Municipal Court, No. 83-444-S.

court's virtual abandonment of the 'custody' requirement for federal habeas review. reaches far beyond the de novo system.

CONCLUSION

For the reasons stated above the decision of Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

Massachusetts General Laws, Chapter 218, Section 26: General Provisions.

The district courts and the municipal court of the city of Boston shall have original jurisdiction, concurrent with the superior court, of the following offenses, complaint of which shall be brought in the division of the district court department, or in the Boston municipal court department, as the case may be, within which judicial district the offense was allegedly committed or is otherwise made punishable: all violations of bylaws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes listed in paragraph (a) of section twenty-four G of chapter ninety section fifteen A of chapter two hundred and sixty-five and sections sixteen, seventeen, eighteen, nineteen, twenty-eight, forty-nine and one hundred and twenty-seven of chapter two hundred and sixty-six, and the crimes of malicious destruction of personal property under section one hundred and twenty-seven of chapter two hundred and sixty-six, indecent assault and battery on a child under fourteen years of age, escape or attempt to escape from any penal institution, forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They

shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

Massachusetts General Laws, Chapter 218, Section 26A: Trial by jury of six; waiver.

Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, Chapter 218, Section 27: Imposition of penalties.

They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison.

Massachusetts General Laws, Chapter 218, Section 27(a): Appeals; jury-of-six sessions.

(a) Every division of the district court department is authorized to hold jury-of-six sessions for the purpose of hearing appeals by defendants found guilty in the several divisions of criminal offenses over which the district courts have original jurisdiction under the provisions of section twenty-six. The Boston municipal court department shall also be so authorized for the purpose of hearing appeals from convictions in said Boston municipal court department, or in the divisions of the district court department in Suffolk county.

Massachusetts General Laws, Chapter 218, Section 27(g): Appeals; jury-of-six sessions.

(g) The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The administrative justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective departments and shall assign justices thereto, to the end that speedy trials may be provided for such appeals. Review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the

superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three.

Massachusetts General Laws, Chapter 276, Section 65: Condition of recognizance.

The condition of a recognizance of a person, either with or without surety, binding him to appear before a court or justice to answer to a charge against him or to prosecute an appeal shall be so framed as to bind him personally to appear at the time so expressed, and at any subsequent time to which the case may be continued, unless previously surrendered or discharged, and so from time to time, until the final decree, sentence or order of the court or justice thereon, and to abide such final sentence, order or decree, and not depart without leave. The condition of a recognizance of a person held to answer to a charge before a district court shall be further so framed as to bind him to appear before the district court to answer to the charge and before the superior court to prosecute an appeal on said charge or to answer to any indictment which may be returned against him. The superior court shall by rule provide for the forms of recognizances and bail bonds. A recognizance of a person held to answer to a complaint before a district court which is required by law to sit in more than one municipality may, with his consent or at his request, be

conditioned for his appearance at the next sitting of the court at any one of said municipalities.

Massachusetts General Laws, Chapter 278, Section 18: Appeals in criminal cases to jury-of-six sessions; recognizance.

Whoever is found guilty of a crime before a justice in a district court, or in the municipal court of the city of Boston, having filed the written waiver of trial by jury in the first instance provided by section twenty-six A of chapter two hundred and eighteen, may appeal the finding of guilty or the sentence imposed thereon to a jury-of-six session in accordance with section twenty-seven A of chapter two hundred and eighteen, and at the time of such finding of guilty or sentencing shall be notified of his right to take such appeal. The case shall be entered in the jury-of-six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at said jury session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not

depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case only for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court, or the municipal court of the city of Boston, may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 24: Failure to enter and prosecute appeal; sentence.

If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the jury-of-six session may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

Massachusetts General Laws, Chapter 279, Section 3: Arrest without warrant of person on probation; warrant for arrest

of persons already imprisoned; application for disposition.

At any time before final disposition of the case of a person placed under probation supervision or in the custody or care of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence. If such suspension is revoked, the sentence shall be in full force and effect. If a warrant has been issued by the court for the arrest of such a person and he is a prisoner in any correctional institution, jail or house of correction, the commissioner of correction, the sheriff, master or keeper of said house of correction, or in Suffolk county, the penal institutions commissioner of the city of Boston, as the case may be, having such prisoner under his supervision or control, upon receiving notice of such warrant, shall notify such prisoner that he has the right to apply to the court for prompt disposition thereof. Such an application shall be in writing and given or sent by such prisoner to the commissioner of correction, or such sheriff, master, keeper, or penal institutions commissioner, who shall promptly forward it to the court from which the warrant issued, by certified

mail, together with a certificate of said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner, stating (a) the term of commitment under which such prisoner is being held, (b) the amount of time served, (c) the amount of time remaining to be served, (d) the amount of good time earned, (e) the time of parole eligibility of such prisoner, and (f) any decisions of the board of parole relating to such prisoner. Said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner shall notify the appropriate district attorney by certified mail of such application to the court. Any such prisoner shall, within six months after such application is received by the court, be brought into court for sentencing or other lawful disposition of his case as hereinbefore provided.

In no case where a provision of this chapter provides for a finding, disposition or other order to be made by the court, or for a warrant to be issued, shall such be made or issued by any person other than a justice, special justice or other person exercising the powers of a magistrate.

Title 28, United States Code, Section 2241: Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme court, any justice thereof, the district courts and any circuit judge within their

respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and

effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

Title 28, United States Code, Section 2254: State custody; remedies in state courts.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. §636.